Nos. 14-1468, 14-1470, 14-1507

In the Supreme Court of the United States

DANNY BIRCHFIELD,
Petitioner,

v

NORTH DAKOTA,
Respondent.

WILLIAM ROBERT BERNARD, JR.,
Petitioner,

v.

MINNESOTA,
Respondent.

STEVE MICHAEL BEYLUND,
Petitioner,

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,
Respondent.

On Writs of Certiorari to the Supreme Courts of Minnesota and North Dakota

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AMICUS CURIAE BRIEF OF MOTHERS AGAINST DRUNK DRIVING SUPPORTING THE RESPONDENT STATES

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STATEMENT OF INTEREST[1]

Amicus Mothers Against Drunk Driving (MADD) was founded in May 1980. Its mission is to end drunk driving, help fight drugged driving, support the victims of these violent crimes, and prevent underage drinking. In pursuit of those objectives, MADD participates actively in public and private studies, legislative initiatives, and law-enforcement programs aimed at reducing the incidence of alcohol-related roadway tragedies. MADD is one of the largest victim-services organizations in the United States. In 2015, for example, MADD provided a service to victims and survivors of drunk- and drugged-driving incidents every four minutes on average.

In 2006, MADD launched a new "Campaign to Eliminate Drunk Driving." One of the key aspects of this campaign is supporting law enforcement in their efforts to catch drunk drivers, keep them off the road, and discourage others from driving while under the influence of alcohol. The strict and swift enforcement of drunk driving laws, through arrest and prosecution, is essential to that effort. MADD supports law enforcement's use of all constitutionally permissible

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[1] Under Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no party or counsel for a party helped fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel funded work on the brief.

Under Supreme Court Rule 37.2, *amicus curiae* also notes that on March 11, 2016, Petitioners consented to the filing of this brief. On March 14 and 15, 2016, Respondents consented to the filing of this brief.

tools to prevent drunk driving. Some of the most effective enforcement tools are blood alcohol concentration (BAC) tests, to which drivers in all United States jurisdictions impliedly consent when receiving driver's licenses.

Some states have elected to impose modest criminal penalties on an individual's decision to withdraw that consent. The Supreme Courts of Minnesota and North Dakota have affirmed those statutory penalties. Reversal of those decisions threatens to hamper enforcement efforts against drunk drivers and, as a result, could lead to increased drunk driving and increased loss of life. The critical need to enhance, rather than hamper, such enforcement efforts implicates the core mission of MADD.

INTRODUCTION AND SUMMARY OF ARGUMENT

A drunk driver in a large SUV careens down a four-lane street after midnight. His blood alcohol level is several points over the legal limit. The driver's mental focus wanders in and out, and he struggles to keep his bleary eyes on the road ahead of him. In his stupor, he neglects the approaching intersection and the red traffic light that vainly warns him against the crossing traffic. His foot never leaves the gas pedal. The SUV T-bones a smaller sedan, instantly killing the smaller car's blameless, unsuspecting driver.

This daily occurrence remains one of the most pressing problems facing society. Every year, drunk drivers kill thousands and seriously injure many more. "'No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in

eradicating it.'" *Missouri v. McNeely*, 133 S. Ct. 1552, 1565 (2013) (plurality opinion) (quoting *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990)). And no one in these cases disputes either fact.

In the specific context of these drunk driving cases, the critical question is *not* whether a State may penalize an arrested driver's refusal to consent to a warrantless BAC test. A State may do that. *See South Dakota v. Neville*, 459 U.S. 553, 560 (1983) (emphasizing that a "penalty for refusing to take a blood-alcohol test is unquestionably legitimate"); *accord McNeely*, 133 S. Ct. at 1566 (plurality opinion) (highlighting the "significant consequences when a motorist withdraws consent").

The relevant question here is what "penalty" or "significant consequences" a State may choose in order to further its undisputed interest in trying to reduce the carnage caused by drunk driving. Minnesota and North Dakota permissibly impose severe loss-of-driving administrative penalties on BAC test-refusers. Those States choose also to impose on test-refusers modest criminal penalties—usually misdemeanors. Those penalties have no constitutional impediment in this setting. States have an undisputed high interest in roadway safety, which is reasonably related to encouraging arrested drivers not to withdraw consent for BAC tests. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973) (highlighting that "the community has a real interest in encouraging consent" to police searches).

The Court should reject the attempt of Petitioners and supporting *amici* to impose a novel categorical rule against all "criminal" penalties. Petitioners and their

supporters defend their proposed rule only by *assuming* that all penalties somehow "cross the Rubicon" into unconstitutional territory simply by donning the label, "criminal." But no such rule exists in the Court's Fourth Amendment jurisprudence, or anywhere else. Indeed, the Court has generally rejected categorical, single-criterion rules for the Fourth Amendment. *See McNeely*, 133 S. Ct. at 1563. That is particularly true in the area of consent searches. *See Schneckloth*, 412 U.S. at 227 Petitioners rely on a few isolated cases involving other rights or involving other, non-drunk-driving settings where core privacy interests are greater. The cases are easily distinguished on those grounds.

The unconstitutional conditions doctrine also does not support a new *per se* rule against all criminal penalties. That doctrine, applied inconstantly in other contexts, has never been applied in a Fourth Amendment case. Even if it does apply, the relatively minor criminal penalties imposed by the state statutes easily satisfy the "nexus" and "rough proportionality" factors used in other settings.

In considering the appropriateness of particular penalties, the Court generally defers to state choices because penalties are within the province of state legislatures and because of the inherent nature of our nation's federal system. *See Harmelin v. Michigan*, 501 U.S. 957, 998-999 (1991) (Kennedy, J., concurring). Here, the power of federalism is even greater where States attempt to find effective means to combat drunk driving. Evidence supports the salutary effect of modest criminal penalties to reduce refusals and increase drunk driving convictions.

Finally, Petitioners' unprecedented *per se* proposal to ban all "criminal" penalties cannot be right because it would produce absurd results. Their categorical ban would mean that, faced with an arrested drunk driver who refused a BAC test, States could choose the hugely onerous "civil" penalty of, for example, a 3-year driving license revocation and a $10,000 fine, but could not employ the relatively minor "criminal" consequence of one hour in jail.

Nothing in the plain language of the Fourth Amendment (or anywhere else in the Constitution) requires or supports such a sweeping rule. This Court should not create an unprecedented categorical ban on modest criminal penalties, but should continue to permit state legislatures in the federalism laboratory to experiment with the most effective mix of incentives to reduce and ultimately end the undisputed scourge of drunk driving.

ARGUMENT

I. STATES HAVE A COMPELLING INTEREST IN DRUNK DRIVING ENFORCEMENT.

A. The Court And The Parties Accepted The Compelling State Interest.

The Court has long recognized the harm caused by drunk drivers. *See, e.g.*, *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."); *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (acknowledging "the problems of traffic irresponsibility and the frightful

carnage it spews upon our highways"); *Perez v. Campbell*, 402 U.S. 637 (1971) (Blackmun, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars."). "The carnage caused by drunk drivers is well documented." *Neville*, 459 U.S. at 558; *accord Sitz*, 496 U.S. at 451 ("Media reports of alcohol-related death and mutilation on the Nation's roads are legion.").

The Court has also recognized a State's "paramount interest in preserving the safety of its public highways" and creating "deterrent[s] to drunken driving." *Mackey v. Montrym*, 443 U.S. 1, 17–18 (1979). A State also has a recognized "interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings" and thus is entitled to offer a "strong inducement to take" a BAC test. *Id.* at 18.

Petitioners and their supporters acknowledge—as they must—that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." (Brief for Petitioner Birchfield ("Birchfield Br.") at 20; *see also* Motion of Indiana Tech Law School at 8 (acknowledging a criminal refusal statute "admittedly achieves worthy policy objectives")). Public safety is an undisputed, compelling reason for States to save lives through reasonable legislative deterrents to drunk driving.

B. Drunk Driving Is Still A "Pressing Problem."

Drunk driving continues to plague state roadways. In 2014, 9,967 people died in drunk driving crashes. National Highway Traffic Safety Administration (NHTSA), *Traffic Safety Facts*, 2014 Data 2

(No. 812231, Dec. 2015) *available at* http://www-nrd.nhtsa.dot.gov/Pubs/812231.pdf. That still-astounding number is thankfully lower than the 25,000 deaths per year mourned in 1990 in *Sitz*. *See* 496 U.S. at 451. But drunk driving deaths still remain a significant portion of total vehicle fatalities—nearly one third of all 2014 traffic deaths. *See* NHTSA, 2014 Data 2. In that year, drunk driving killed an American every 53 minutes. *Id.* Drunk driving crashes cost an estimated $49.8 billion in 2010. *Id.*

Despite "121 million self-reported episodes of alcohol-impaired driving among U.S. adults each year," Center for Disease Control, Alcohol-Impaired Driving Among Adults–United States, 2012 (Aug. 2015), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6430a2.htm, only 1.1 million drivers were arrested for driving under the influence of alcohol or narcotics in 2014. FBI, Crime in the United States 2014, Table 29 (Estimated Number of Arrests), *available at* https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-29. Many of those were habitual drunk drivers, in need of stiffer penalties handed out to repeat offenders.

Improved enforcement of drunk driving laws has contributed greatly to the success over the years. Enforcement, including both arrests and convictions, reduces the harm caused by drunk driving through several mechanisms.

First, arresting and convicting drunk drivers removes those drivers from the road through imprisonment, license suspensions, or other penalties that restrict the operation of vehicles while impaired (such as ignition-interlock devices, which prevent an

individual from starting his or her car without breathing into the device and recording a blood alcohol reading under the legal limit). Every drunk driver off the road is one less potential source of crashes, injuries, and deaths.

Second, the strict enforcement of drunk driving laws has significant deterrent effects. Individuals who observe the consequences of driving drunk, including convictions and the resulting penalties, are less likely to drive drunk themselves. A 2008 study determined that individuals were less likely to drink and drive if they perceived a higher probability of being stopped or arrested by law enforcement. Anthony Bertelli, *The Behavioral Impact of Drinking and Driving Laws*, POLICY STUDIES JOURNAL, 36:4, 545–569 (2008).

C. Criminal Refusal Statutes Are Effective In Reducing Refusals And Increasing Convictions.

Roughly 20% of drivers asked to submit to BAC testing refuse to do so. *See* NHTSA, *Breath Test Refusals & Their Effect on DWI Prosecution* (No. 811551, July 2012). Refusing to take a BAC test does not mean the driver is innocent of drunk driving. But it does make it less likely that an impaired driver will be convicted for his extremely dangerous—potentially fatal—behavior. In a recent study, the refusal rates for states was inversely related to conviction rates for cities in the state. *Id.* at 42 ("As statewide refusal rates increased, overall conviction rates decreased linearly.").

Likewise, cities located in States that had lower refusal rates convicted more drunk drivers, thus

deterring them from driving drunk. *Id.* at v. By contrast, drivers in States with higher refusal rates can more readily skirt conviction for driving under the influence of alcohol by merely refusing to take a breath test. In fact, those previously convicted of drunk driving are more likely to refuse a test than first-time offenders. NHTSA, *Breath Test Refusals in DWI Enforcement: An Interim Report*, at 22 (No. 300, Aug. 2005). Repeat offenders gain an advantage through test refusal. *Id.* ("Repeat offenders often benefit from refusing the BAC test because it clouds the case just enough to give them a slight advantage in court proceedings. The administrative penalties are not severe enough to deter refusals by repeat offenders.").

Just like the sobriety checkpoints approved in *Sitz*, 496 U.S. at 455, refusal statutes with modest criminal penalties are effective and constitutionally permissible tools in the fight against drunk driving. The Court should permit them and thus enhance our States' ability to obtain drunk driving convictions, which is essential to drunk driving prevention.

II. MODEST CRIMINAL PENALTIES FOR TEST REFUSAL PERMISSIBLY FALL WITHIN THE BROAD RANGE OF LEGAL TOOLS ALREADY APPROVED BY THE COURT.

The courts below, the parties, and many *amici* have had trouble specifying the analytical framework presented by these cases. The discussions have wandered over a landscape that includes search incident to arrest, inherent reasonableness, diminished expectation of privacy, consent, unconstitutional conditions, and other concepts. But the Court need not

examine all of these possible trees because Petitioners have now identified the "proper analytical" forest. (Birchfield Br. at 30). At bottom, Petitioners seek reversal of their criminal convictions based on their "view" that "the Constitution *categorically* precludes States from attaching criminal penalties" to a refusal to consent to a BAC test after a drunk driving arrest. *Id.* (emphasis added).[2]

The Court should reject Petitioners' unprecedented *per se* proposal to categorically ban, by reason of the Constitution, *any* penalty for test refusal that can be labeled "criminal." The bases for rejecting that view are strong, and assorted.

First, Petitioners' proposed *per se* rule runs headlong into the Court's extensive history of recognizing the compelling state interest in highway safety, and providing law enforcement with the appropriate tools to combat drunk driving. Even more directly, the proposed rule cannot thread the needle through the Court's general approval of implied consent laws and specific approval of significant adverse consequences for withdrawal of that consent. *See Neville*, 459 U.S. at 560; *accord McNeely*, 133 S. Ct. at 1566.

Second, nothing in the Constitution or in the Court's jurisprudence requires a *per se* ban on all criminal

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[2] Petitioners actually seek an even broader *per se* rule against attaching criminal penalties to any "assertion of an otherwise applicable Fourth Amendment right, whether or not the State purports to make acceptance of those penalties a condition for awarding a license or other benefit." (Birchfield Br. at 30). That broader issue is not raised by these cases.

penalties in this area. The Court's Fourth Amendment jurisprudence—epitomized in *Schneckloth* and *McNeely*—uniformly rejects such categorical rules in favor of a case-by-case analysis based on the totality of circumstances. Petitioners offer no precedent for the Court to announce a categorical constitutional ban on a penalty—no matter how insignificant—simply because the State calls the penalty "criminal." The few cases on which Petitioners rely do not support that *per se* rule and are easily distinguishable. The Court reversed criminal convictions in those cases not because of criminal penalties, but because the overall warrantless-search regime was otherwise impermissible under the Fourth Amendment. *See, e.g.*, *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2452 (2015) (statute requiring police access to hotel registry deemed facially invalid for lack of pre-compliance review); *Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523 (1967) (prophylactic health inspection of residences). Here, however, the Court has repeatedly approved the universal implied consent laws and the serious penalties for withdrawal of that consent. Without a legal leg to stand on, Petitioners and *amici* resort to unsupported *ipse dixit*.

Third, a *per se* ban on certain penalty categories would be inconsistent with the Court's general penalty jurisprudence. The Court constitutionally prohibits entire penalty categories only in the most extreme cases. *Compare Graham v. Florida*, 560 U.S. 48 (2010), *with Harmelin*, 501 U.S. at 957. In the vast majority of situations, federalism requires deference to States' reasonable penalty choices. The modest criminal penalties (almost always misdemeanors) in the North Dakota and Minnesota statutes at issue here are

reasonable legislative measures to encourage valuable BAC tests and combat the undisputed harms caused by drunk drivers. In fact, the federal government encourages those penalties. *See* NHTSA, *Refusal of Intoxication Testing: A Report to Congress*, at 20 (Sept. 2008). ("States should review their laws and practices to ensure that refusal to take a BAC test is *a criminal offense* and that the penalties are greater than those for conviction on an impaired driving offense.") (emphasis added).

A. States May Place "Significant Consequences" On a Motorist's Withdrawal of Implied Consent.

Petitioners' proposed *per se* ban on criminal penalties does not overcome the Court's long history of affirming drunk driving convictions. Petitioners and their *amici* noticeably give short shrift to those cases. The cases collectively affirmed the compelling state interest in highway safety, in combatting drunk driving, and in using BAC tests as a reasonable and important tool in that fight. Most importantly, the cases approved placing significant consequences on an arrested driver's refusal to consent to warrantless BAC tests.

1. The Court Has Historically Supported Law Enforcement Efforts To Combat Drunk Driving, Including The Use Of BAC Tests.

In 1957, the Court first confronted and approved BAC tests in the drunk driving context. *See Breithaupt v. Abram*. After recognizing the "increasing slaughter on our highways" from "avoidable" drunk driving, the

Court held that the extraction of blood from an unconscious drunk driver did not violate the Due Process Clause. *Id.* at 439. The Court approved blood tests generally and specifically a driver's consent to such tests as "part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony." *Id.* at 435 n.2.

Then in *Schmerber v. California*, 384 U.S. 757 (1966), the Court upheld a compelled warrantless blood test against claims that the test violated the Fourth and Fifth Amendments. The Court rejected the argument that BAC tests *per se* constitute compelled self-incrimination. The Court instead observed that a blood test constitutes a search such that a warrant is "ordinarily required." *Schmerber*, 384 U.S. at 770. Turning to the "special facts" of that case, the Court held that the warrantless search was "appropriate" because the officer "might reasonably have believed that he was confronted with an emergency" that "threatened the destruction of evidence," namely the dissipating alcohol in the driver's blood. *Id.* at 770–771.

Even during what was arguably the most active expansion of criminal defendant constitutional rights in history, the Court avoided imposing *per se* rules that would benefit drunk drivers, and the Court never reversed a drunk driving conviction. The Court should not do either now.

2. The Court Has Approved Implied Consent Laws.

The Court has broadly approved searches pursuant to consent as "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth*, 412 U.S. at 228. As recently noted in *McNeely*:

> [A]ll 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose *significant consequences* when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

133 S. Ct. at 1566 (plurality opinion) (emphasis added) (citations omitted); *accord Breithaupt*, 352 U.S. at 435 n.2 (discussing implied-consent laws and assuming "that a driver on the highways in obedience to a policy of the State, would consent to have a blood test made").

In 1979, the Court directly addressed and approved such implied-consent laws in *Montrym*, 443 U.S. at 1. Because of "the compelling state interest in highway safety," the Court upheld a State scheme that subjected drunk drivers to a penalty (summarily suspended license) for refusing a blood alcohol test. *Id.* at 19. The Court recognized that "[a] state plainly has the right to offer incentives for taking a test that provides the most

reliable form of evidence of intoxication for use in subsequent proceedings." *Id.* at 19; *accord id.* at 18 (approving "strong inducement to take the breath-analysis test"). The Court held that the penalty itself could validly serve "as a deterrent to drunk driving." *Id.* at 18.

Then in *Neville*, the Court explicitly approved a State's right to impose test-refusal penalties and consequences against an arrested drunk driver. After cataloguing the "carnage caused by drunk drivers," *Neville*, 459 U.S. at 558, the Court held that states may place "a price" on a drunk driver's choice to withdraw implied consent and not submit to a BAC test. *Id.* at 560. *Neville* held that "a penalty for refusing to take a blood-alcohol test is *unquestionably* legitimate, assuming appropriate procedural protections." *Id.* (discussing license suspension and citing *Mackey*) (emphasis added). The Court also permitted a penalty tied to the criminal context that "discourages the choice of refusal by allowing the refusal to be used against the defendant at trial." *Id.* Indeed, the Court highlighted that "the criminal process often requires suspects and defendants to make difficult choices." *Id.* at 564. The state-imposed adverse consequences did not give rise to "impermissible coercion" and did not "directly compel respondent to refuse the test, for it gave him the choice of submitting to the test or refusing." *Id.* at 562.

Most recently, in *McNeely*, the Court rejected a proposed *per se* rule in this precise context, specifically, a rule that all BAC tests present an exigency that justifies an exception to the Fourth Amendment. A plurality described implied consent laws as being one available tool among the "broad range of legal tools to

enforce" drunk driving laws. *McNeely*, 133 S. Ct. at 1566. The opinion cited *Neville* as support for the "significant consequences" that States may impose under those approved implied consent laws. Some of those approved significant consequences can be severe, as Petitioners themselves highlight. *See* Birchfield Br. at 22-23 (describing consequences of license suspension).

Thus, the Court has approved the use of severe test-refusal penalties, such as license suspension and admission of test-refusal evidence at trial. Petitioners do not meaningfully challenge those Court-approved penalties. The Court should reject Petitioners' unsupported attempt to impose an arbitrary, overbroad *per se* rule against more modest criminal penalties.

B. No Constitutional Rule Categorically Precludes Criminal Penalties Regarding Consent To Fourth Amendment Searches.

Petitioners and their *amici* seek an unprecedented *per se* rule against any consequence for withdrawing implied consent to a BAC test if that penalty bears the label "criminal." Petitioners' primary brief posits their collective view that "the Constitution *categorically* precludes States from attaching criminal penalties to the assertion of an otherwise applicable Fourth Amendment right." (Birchfield Br. at 30 (emphasis added)). *Amicus* ACLU proposes an even broader blanket rule for all constitutional contexts under which "a State may not subject individuals to criminal sanctions simply because they have asserted a constitutional right." (Brief for the American Civil Liberties Union ("ACLU Am. Br.") at 10). Petitioners

never discuss the actual circumstances of the cases presented here and the relatively modest penalties to which the defendants were subjected because of their convictions under the criminal test-refusal statutes.

Such *per se* rules do not fit the Fourth Amendment. The Court made that clear in this very context when it rejected Missouri's proposed "*per se* rule for blood testing in drunk driving cases." *McNeely*, 133 S. Ct. at 1560. The Court held that Fourth Amendment cases require application of a fact-specific, "totality of the circumstances approach." *Id.* at 1559. The Court could not "accept the 'considerable overgeneralization' that a *per se* rule would reflect." *Id.* at 1561 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 (1997)).

Petitioners nevertheless propose a *per se* approach to the issue of consent, positing categorically that "[c]onsent is no consent at all if the person giving it is forbidden from declining on pain of criminal punishment." (Birchfield Br. at 22). But the Court has rejected *per se* rules in the specific consent-to-search context. Recognizing "the legitimate need for such searches," Justice Stewart, writing for the majority, marshaled many consent cases to show that in "determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of circumstances." *Schneckloth*, 412 U.S. at 226.[3] The Court found that "none of [the decisions] turned on the presence or absence of a single controlling criterion." *Id.* Justice Stewart reviewed other constitutional

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[3] Petitioners make no meaningful attempt to conduct a totality of circumstances analysis on the facts of these cases and the particular statutory penalties at issue. (*See* Birchfield Br. at 22.)

contexts in which a police encounter is deemed "inherently coercive," but likewise rejected those *per se* approaches for consent searches under the Fourth Amendment. *Id.* at 240.

Petitioners and their *amici* present no Fourth Amendment case in which the Court has adopted a *per se* rule barring all criminal penalties. Instead, they rely on a handful of cases reversing criminal convictions—not because of a *per se* bar—but because the overall "search regimes" at issue were constitutionally flawed. *Patel*, 135 S. Ct. at 2452 (statute requiring police access to hotel registry deemed facially invalid for lack of pre-compliance review); *accord Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523 (1967) (administrative public health inspection of residence violated Fourth Amendment); *See v. City of Seattle*, 387 U.S. 541 (1987) (administrative public health inspection of commercial warehouse violated Fourth Amendment). The Court explicitly granted certiorari in *Camara* and *See*, not to look at criminal penalties, but "to re-examine" the entire subject of "whether administrative inspection programs, as presently authorized and conducted violate Fourth Amendment rights." *Camara*, 387 U.S. at 525.

Petitioners and *amici* over-rely on a single clause at the end of *Camara* that "appellant may not constitutionally be convicted for refusing to consent to the inspection." (Birchfield Br. at 31 (quoting *Camara*, 387 U.S. at 540)). That does not require reversal here. The defendant in *Camara* could not "constitutionally be convicted" because the entire inspection scheme was unconstitutional. Nothing in that clause—or in any

other case from this Court—announces a blanket ban of all criminal penalties in the Fourth Amendment context.

Unable to muster applicable and persuasive precedent, Petitioners invoke adverbs and generalized assertions that insufficiently support their constitutional argument. Petitioner Beylund proclaims (without proof) that all criminal penalties are "[s]elf-evidently" and "patently" coercive. (Beylund Br. at 11). He tries vainly to valorize his categorical anti-criminalization position with the claim that it is a matter of "simple common sense" that "is beyond cavil," and while the opposing view is "bewildering." *Id.* at 11–12. Similarly, Petitioner Birchfield offers only his *ipse dixit* that the difference between all (unspecified) criminal penalties and civil license revocation penalties "should be obvious." (Birchfield Br. at 40). It is not obvious, and such categorical positions have never been recognized or adopted in any case from this Court.

The *amici* supporting Petitioners fare no better. The ACLU asserts without meaningful support that permissible regulatory penalties "are a far cry" from criminal penalties and that there is a "constitutional gulf" between the two. (ACLU Am. Br. at 13–14). Without actual case law to map that alleged gulf, the ACLU turns to fiat, declaring that "it is simply not a close question" that all criminal penalties are "over the line." *Id.* at 17 The DUI Defense Lawyers advance even hotter rhetoric by asserting that all criminal penalties are "an entirely other thing" from the consequences already approved by the Court, and that modest criminal penalties point the nation toward "Stalin's Soviet Union" and "Hitler's Nazi Germany."

(DUI Def. Law. Br. at 28, 31). That hyperbole is unwarranted and fictitious, as demonstrated by the many years that Minnesota and North Dakota, among other States, have had effective test-refusal statutes with modest criminal penalties and the fact that the federal government recommends such statutes to ameliorate drunk driving.

C. In The Interest Of Federalism, States Generally Have Wide Latitude To Pursue Compelling Interests And To Impose Penalties.

Petitioners' proposed constitutional bans on all implied-consent penalties labeled "criminal" also runs counter to basic federalism principles and this Court's concomitant strong deference to reasonable state choices when pursuing compelling state interests—especially with regard to penalties. Through criminal refusal statutes, a national safer-highway experiment is proceeding "'through the workings of normal democratic processes in the laboratories of the States.'" *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 79 (2009) (Alito, J., concurring) (quoting *Atkins v. Virginia*, 536 U.S. 304, 326 (2002) (Rehnquist, C. J., dissenting)); *accord United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J. concurring) (highlighting "the theory and utility of our federalism , for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"). Some States have adopted criminal refusal statutes; others have not. *See id.* (Kennedy, J., concurring) (noting state law differences and "disagreement about how best to accomplish" an agreed goal of

prohibiting guns near schools). Petitioners do not discuss federalism at all.

As discussed above, the Court has repeatedly confirmed, in many different formulations, the horrific damage levied by drunk drivers as well as the States' compelling interest in reducing it. "We have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety. States surely have at least as much interest in removing drunk drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs." *Montrym*, 443 U.S. at 17. States should have that same "great leeway" in selecting modest criminal penalties to pursue their compelling interest in combatting drunk driving.

This Court limits "categorical rules" restraining State penalty discretion to only the most extreme and disproportionate punishments. *See Harmelin*, 501 U.S. at 1001 (Kennedy, J., plurality opinion) (stating that the Constitution "forbids only extreme sentences that are 'grossly disproportionate' to the crime") (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)); *see also, e.g.*, *Graham v. Florida*, 560 U.S. at 60–61 (categorically prohibiting life sentences without parole for juvenile defendants). The controlling plurality opinion in *Harmelin* identified four bases for such limitations, including federalism, referring specifically to: "the inevitable, often beneficial result of the federal structure." 501 U.S. at 999 (citing *Solem*). "Our Constitution is made for people of fundamentally differing views. Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some States will always bear the distinction of treating

particular offenders more severely than any other State." *Id.* at 1000 (internal quotations and citations omitted).

Nothing in the words of the Fourth Amendment, or anywhere else in the Constitution, requires Petitioners' proposed *per se* nationwide ban on modest criminal penalties. Such a ban would improperly and unnecessarily "foreclose[] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

III. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE DOES NOT INVALIDATE THE TEST REFUSAL STATUTES AT ISSUE.

The unconstitutional conditions doctrine also does not support a new *per se* rule against all "criminalization" penalties for an arrestee's refusal to submit to chemical testing when arrested for drunk driving. Foremost, the Court has never—and seemingly no court has ever—applied the doctrine in the Fourth Amendment context. Indeed, "[a]lthough it has a long history, the 'unconstitutional conditions' doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question." *Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12 (1994); *see also Beylund v. Levi*, 859 N.W.2d 403, 411 (N.D. 2015) (expressing doubt whether the unconstitutional conditions doctrine "applies to a constitutional challenge based on the Fourth Amendment").

As applied to date, the doctrine serves to avoid extortionate governmental demands that coerce a person into waiving certain constitutional rights, such as the First Amendment right to free exercise of one's religion, *Sherbert v. Verner*, 374 U.S. 398, 404 & n.6 (1963), or the Fifth Amendment right to just compensation for property takings, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Here, the Petitioners raise concerns stemming from the Fourth Amendment, stating that the Minnesota and North Dakota test-refusal statutes improperly coerce mandatory advance surrender of an arrestee's constitutional right to be free from unreasonable searches and seizures. Petitioners are incorrect.

The Court should uphold application of the statutes, including the imposition of criminal penalties for qualifying test refusals. First, the statutes do not condition the privilege of soberly driving on state roadways upon the surrender of one's Fourth Amendment right. Thus, the unconstitutional conditions doctrine is not implicated. Second, even if there were a constitutional right to refuse a chemical blood-alcohol test, there is both a nexus and proportionality between the state-provided privilege to drive and the conditions imposed in exchange for that privilege, namely, requiring a driver to consent to a blood-alcohol test upon probable cause of drunk driving or else accept enumerated penalties for a refusal. *Koontz*, 133 S. Ct. at 2591 (requiring a "nexus" and "rough proportionality").

The cases before the Court are not ones in which the government has, through legislation, engaged in "out-and-out extortion" in an effort to thwart an

individual's constitutional rights, as required to support application of the unconstitutional conditions doctrine. *Koontz*, 133 S. Ct. at 2595 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (referencing "an out-and-out plan of extortion"))). Instead, the statutes reasonably assist state governments in their perpetual efforts to combat the well-documented "carnage caused by drunk drivers," the tragedies of which the Court has "repeatedly lamented." *Neville*, 459 U.S. at 558.

A. Test Refusal Does Not Implicate a Constitutional Right Under The Fourth Amendment.

The unconstitutional conditions doctrine may invalidate legislation only when the State has granted a benefit, such as the privilege to drive, on the condition that the beneficiary surrender a *constitutional* right. *E.g.*, *Koontz*, 133 S. Ct. at 2594. In the Minnesota and North Dakota statutes here at issue, as in eleven other States, it is a crime for a person arrested for driving while impaired to refuse to submit to a chemical blood-alcohol test. But as the Court noted in *Neville*, addressing implied-consent legislation, the right to refuse a chemical test is *not* a constitutional right. An arrestee's "right to refuse the blood-alcohol test, by contrast [to a right bearing constitutional dimension], is simply a matter of grace bestowed by the [state] legislature." *Neville*, 459 U.S. at 565. Because prosecution for test refusal does not implicate a constitutional right under the Fourth Amendment, the unconstitutional conditions doctrine does not apply.

To be sure, a person suspected of drunk driving has a constitutional right not to be tested without a warrant or a valid exception to the warrant requirement. *See, e.g.*, *McNeely*, 133 S. Ct. at 1556 (rejecting a *per se* exigency rule as "an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases"). Actual testing of an arrestee involves a search and seizure for purposes of the Fourth Amendment. *E.g.*, *Schmerber*, 384 U.S. at 767 ("Such [blood] testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of th[e Fourth] Amendment."); *Skinner v. Ry. Labor Execs' Ass'n*, 489 U.S. 602, 616–617 (1989) (determining that taking a blood, breath, or urine sample implicates the Fourth Amendment). In the state statutes here at issue, however, the arrestee may at all times refuse to be subjected to a chemical blood-alcohol test. In those instances, the Fourth Amendment continues to limit the State's authority to search his body and seize a sample of blood for chemical testing. The constitutional right to be free from unauthorized searches and seizures is never surrendered.

Suspected drunk drivers, however, have no constitutional right to *refuse* to be tested—that is, to withhold consent—without penalty, including criminal prosecution for that refusal. *Neville*, 459 U.S. at 560 ("This permission [to refuse a test] is not without a price, however."). If an arrestee refuses the test, specified civil and criminal penalties can flow from that choice. The Court has "recognize[d], of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects

and defendants to make difficult choices." *Id.* at 564. The Minnesota and North Dakota test-refusal statutes can present arrestees with a difficult choice. But the unconstitutional conditions doctrine does not prevent state governments from presenting that choice in the first instance.

B. Even If There Were a Constitutional Right to Refuse Testing, The Condition Imposed Is Closely Related to the Government's Valid Objectives.

Even if a person suspected of drunk driving were afforded a constitutional right to refuse testing, the civil and criminal penalties attendant to that right do not warrant invalidating the statutes under the unconstitutional conditions doctrine. The doctrine's "overarching principle" is to "prevent the government from coercing people into giving" up their constitutional rights. *Koontz*, 133 S. Ct. at 2594. The Court, however, "has never developed a coherent rationale for determining when [the availability of choices] rise[s] to the level of 'coercion.'" Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV 1413, 1428 (1989). The doctrine nonetheless requires coercion, sometimes referred to as extortion, in compelling individuals to relinquish a constitutional right. *E.g.*, *Koontz*, 133 S. Ct. at 2595, 2596, 2597, 2603 (repeatedly referencing applicability of the unconstitutional conditions doctrine in order to remedy "extortionate demands" imposed by a governmental condition).

A government's demands, expressed through legislation, are not unconstitutionally extortionate so long as "there is a 'nexus' and 'rough proportionality'

between the demands and the [benefits afforded]." *Koontz*, 133 S. Ct. at 2591. The Court announced the "nexus" and "rough proportionality" requirements in *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 386, respectively. Application of these requirements led to a conclusion in *Koontz* that, addressing the Fifth Amendment, "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 133 S. Ct. at 2591.

On this backdrop, the unconstitutional conditions doctrine looks to the purpose of the challenged condition. It invalidates only those laws having a challenged condition with no significant relevance to the governmental objective of the privilege that the government conditionally confers. Here, we have a clear nexus between the privilege to drive soberly on state roadways and the associated condition of consenting to a BAC test or, in lieu of the test, accepting civil and criminal penalties. As the Court expressed in *Nollan*, so long as the "condition serves the same governmental purpose" as the privilege, there is a sufficient nexus. 483 U.S. at 837 The requisite nexus is present here because both the privilege and the condition directly address the unassailable governmental interest in safe roads and preventing drunk driving. The Minnesota and North Dakota statutes take essential steps toward achieving that goal. The conditions could hardly be more tightly related to the statutes' legitimate public purposes. *Cf. id.* (observing that a nexus would be lacking where, for example, a state law "forbade shouting fire in a

crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury").

Equally, at least a "rough proportionality" exists between the conditions imposed and the benefits provided. *Dolan*, 512 U.S. at 386. Imposing criminal penalties on arrestees who refuse to consent to a blood-alcohol test is austere, but the seriousness of the effects of drunk driving eclipse those penalties. As the Court accurately observed nearly sixty years ago, "[t]he increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." *Breithaupt*, 352 U.S. at 439. Yet the problem persists. Substantial conditions are warranted to address an even more substantial problem.

At its essence, the unconstitutional conditions doctrine serves to "forbid[] the government from engaging in 'out-and-out extortion' that would thwart" an individual's constitutional right. *Koontz*, 133 S. Ct. at 2595. No such extortion exists here. The statutes, including the imposition of modest criminal penalties upon refusal of a blood-alcohol test, appropriately leverage legitimate state interests in thwarting the problem of drunk driving. The statutes bear a clear nexus to those interests and endeavor to meet those interests through conditions that are clearly proportional to the problem.

CONCLUSION

For all these reasons and those stated in Respondents' separate briefs, this Court should affirm the three judgments below.

Respectfully submitted,

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